In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1304

JOSEPH E. CAFERO AND
DOMINICK VINCIGUERRA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), as being unconstitutional on its face; they also assert that, in any event, proper procedures were not followed within the Department of Justice for authorizing the submission to the court of an application for a wiretap order.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners and others were convicted of conspiring to use interstate facilities in aid of an illegal gambling enterprise, in violation of 18 U.S.C. 371 and 1952. Petitioner Cafero was also convicted on one substantive count of making interstate telephone calls for illegal gambling purposes, in violation

of 18 U.S.C. 1952. Cafero was sentenced to concurrent prison terms of a year and a day on each count and was fined $5,000. Vinciguerra was sentenced to nine months' imprisonment and fined $5,000.

Evidence at trial included information obtained from a court-ordered wiretap placed on a telephone regularly used by Cafero. Pending appeal, the defendants moved in the district court for acquittal or for a new trial, challenging for the first time the procedure within the Department of Justice under which authorization was obtained for making the wiretap application in this case. The district court denied the motion; thereafter, the court of appeals affirmed the convictions (Pet. App. 1A-25A).

1. Petitioners argue here, as below, that the wiretap statute, 18 U.S.C. 2510-2520, is unconstitutional on its face. They claim that its requirements for a lawful electronic surveillance do not satisfy the standards of the Fourth Amendment in the following respects: (1) the statute fails to require sufficient particularity in the authorization order; (2) it does not satisfactorily limit the duration of surveillance; (3) it places too much discretion in the executing officers; and (4) it provides inadequate post-intercept notice requirements for informing the parties overheard. Each of these contentions was raised below and was carefully answered in the thorough opinion of the court of appeals (Pet. App. 4A-20A), on which we principally rely here.[1] We point out, in addition, that similar

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[1] Petitioner's separate contention that the government failed to show probable cause for issuance of the wiretap order is unsound. The affidavit accompanying the application for a court order was based in part on information provided by an unnamed informant who had previously furnished reliable information. In addition, the affidavit stated that physical surveillance had "positively placed Joseph E. Cafero at a location which had been determined through electronic

attacks on the constitutionality of Title III have been uniformly rejected by every other court of appeals to pass on the question. See *United States* v. *Tortorello,* C.A. 2, No. 72-1957, decided April 5, 1973; *United States* v. *Bobo,* C.A. 4, No. 71-2077, decided April 23, 1973; *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278; *United States* v. *Cox,* 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.[2]

3. Petitioners also object to the Department of Justice's procedures for authorizing the filing in court of the wiretap application. In the present case, government affidavits filed in the district court in response to petitioners' request for post-trial relief showed that the application for the wiretap order involved here was personally authorized by then Attorney General John N. Mitchell, after it had been processed through the standard procedure within the Department of Justice as set forth in detail in our petition for certiorari in *United States* v. *Giordano,* No. 72-1057, certiorari granted, March 26, 1973. Whether, contrary to petitioners' contention (Pet. 27-28), that procedure comports with the requirements of 18 U.S.C. 2516(1) is an

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surveillances to be active in operating an illegal gambling operation" (C.A. 18a).

Contrary to petitioners' claim (Pet. 29), the prior wiretaps referred to in the contested application were placed on the telephone of one Monzelli, pursuant to court order. Intercepted outgoing calls from Monzelli's telephone revealed that telephone number 215-389-1918 (the subject of the interception in the present case) was being used for gambling purposes by someone named "Ernie." That telephone was not located at Cafero's residence, nor was the number listed in his name (C.A. App. 13a-15a).

[2] And see *Whitaker* v. *United States* and *Perrerra* v. *United States,* presently pending on petitions for certiorari, Nos. 72-1317 and 72-1467.

issue now pending before this Court in *United States* v. *Chavez,* No. 72-1319, certiorari granted, May 21, 1973.[3]

Accordingly, the Court may wish to defer disposition of the present petition pending resolution of the identical procedural issue in *Chavez.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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[3] Our petitions in *Giordano* and *Chavez* are being furnished to petitioners' counsel.